is *Campo* v. *Niemeyer* (7th Cir.), 182 F. 2d 115, and the recent case of *Cawley* v. *Warren* (7th Cir.), October 1954, Opinion #11160.

The Civil Rights Acts were enacted to protect the civil rights of individuals and were not intended to discipline or harass law enforcement officers in the enforcement of the law. *Screws* v. *United States*, 325 U. S. 91.

In the case of *Laughlin* v. *Garnett*, 138 F. 2d 931, certiorari denied 322 U. S. 738, where it was charged that a United States Attorney for the District of Columbia and members of the police force maliciously instigated a criminal proceeding on charges which they knew to be false, the court held that the attorney was immune from civil suits under the provisions of the Civil Rights Act.

In the case of *Mitchell* v. *Greenough* (9th Cir.), 100 F. 2d 184, the plaintiff alleged a conspiracy on the part of the prosecuting attorney, his deputy and a Superior Court Judge and others to convict him of the charge of embezzlement on testimony known to be false. It was held that the complaint did not state a cause of action.

In the case of *Spaulding* v. *Vilas*, 161 U. S. 483, this Court held that a public officer is not liable for instituting a prosecution even though he acted with malice and without probable cause provided the matters acted upon *were among those generally committed by law to the control and supervision of his office.*

Under the same reasoning the court in the case of *Phelps* v. *Dawson* (8th Cir.), 97 F. 2d 339, held that a State Fire Marshal in bringing charges growing out of an investigation of a fire was immune from civil suit because his duty to protect the public required that he be immune from personal liability.

In *Pearson* v. *Reed*, 6 Cal. App. 2d 277, 44 P. 2d 592, it

was held that a city prosecutor, even in a prosecution conducted by himself with malice and without probable cause, was immune from civil actions and in passing upon this cause, it was said:

> "The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be, if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case. Not only would the prosecutor himself be subjected to groundless suits, but his deputies likewise would be accused. The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office."

In the same case at p. 612 of the Opinion, the Court with reference to the case of *Picking* v. *Pennsylvania Railroad Co.*, relied upon by the Petition said:

> "We do not think that *Picking* v. *Pennsylvania R. Co.*, 3 Cir., 1945, 151 F. 2d 240, is a controlling authority. In the first place, the judicial officer involved in that case was a justice of the peace, not a judge of a court of general jurisdiction, as in the case at bar. A possible distinction might be taken on this score; but see *Pratt* v. *Gardner*, 1848, 2 Cush., Mass., 63, 70. More important, the *Picking* case was decided in 1945, without benefit of the illumination and compelling analogy to be found in the opinion of the Supreme Court in *Tenney* v. *Brandhove*, *supra*, which came down several years later. In view of the discussion in the latter case, we have no doubt that the Third Circuit would no longer feel obliged, as it did in the *Picking* case, to read the Civil Rights Act in such literal and unquali-

fied manner as to impose a liability for damages upon a state judicial officer for acts done in the exercise of his judicial function."

In the case of *Francis* v. *Crafts* (1st Cir.), 203 F. 2d 809, which was a case instituted against a Judge of a State Court, the Court said:

> "We went on to say that fortunately *Tenney* v. *Brandhove*, 1951, 341 U. S. 367, 71 S. Ct. 783, 95 L. Ed. 1019, 'has relieved us of the necessity of giving the Civil Rights Act such an awesome and unqualified interpretation.' That case held that the broadly expressed terms of the Civil Rights Act could not have been intended to deprive state legislators of their pre-existing and well-established complete immunity from civil liability for official acts done within the sphere of legislative activity."

II.

The Judgment of the District Court Dismissing the Complaint and the Decision of the United States Court of Appeals Affirming That Decision Are Correct.

The plaintiff's complaint discloses that his charges against the defendants are a conspiracy to commit an unlawful arrest, an unlawful search and seizure, and to knowingly use perjured testimony to convict him (Record, page 6 through 13).

It is to be noted that the plaintiff is presently incarcerated in the Illinois State Penitentiary in Joliet, Illinois, based upon a conviction in a second trial accorded him in connection with the same crime of armed robbery for which he was convicted in this first trial (Record, page 41).

The plaintiff in effect charges that because he was given a new trial under the Illinois Post Conviction Hearing Act (Ill. Rev. Stat. 1949, Ch. 38, pars. 826-832), his constitutional rights were violated so as to enable him to recover

damages against the state police and prosecuting officials, even though upon a second trial he was found guilty of the crime for which he was originally convicted and sentenced. The "Civil Rights Act" has never been extended to encompass such a cause as the plaintiff in the instant case seeks to have adjudicated in the Federal Courts.

Rather than demonstrating that his original conviction was procured through a violation of plaintiff's Civil Rights, the result of the new trial rendered pursuant to the Post Conviction Hearing act indicated and adjudicated the fact that the plaintiff *was not* falsely arrested, that there was no illegal search and seizure and that his conviction was not based upon perjured testimony.

As pointed out by the U. S. Court of Appeals in the instant case, Title 42 U. S. C. A., Section 1983, which gives a cause of action for deprivation of due process does not give a cause of action for conspiracy, while Section 1985 creates a cause of action for conspiracy to deny equal protection under the law.

Since the complaint alleges a conspiracy to violate due process, it does not state a cause of action. The acts charged do not create a cause of action for denial of equal protection because there is no allegation that all citizens of this state are not potentially subject to the same treatment which the petitioner charges he was subjected to.

In the case of *Lyons* v. *Weltmer* (4th Cir.), 174 Fed. 2d 473, the United States Court of Appeals, in holding that a suit against state officials based upon charges of false arrest or false imprisonment was not justiciable in a Federal Court under the Civil Rights Act, said (pp. 473-474):

> "Without attempting to define the cases in which abuse of power by a state official may justify suit in a Federal Court, it is perfectly clear that the case alleged does not fall within that category. If it did,

every case against a state officer for false arrest or false imprisonment would be cognizable in Federal Court. *Screws* v. *U. S.*, 325 U. S. 91; *Bell* v. *Hood*, 327 U. S. 678; *McCartney* v. *West*, 156 Fed. 2d 739. There is no allegation of any matter which would bring the case here within Federal jurisdiction."

In the case of *Yzglesias* v. *Gulf Stream Racing Assn.* (5th Cir.), 201 F. 2d 817, the Court of Appeals, in holding that a complaint alleging that the defendant conspired with state officials to falsely imprison the plaintiff in violation of the defendant's constitutional rights did not state a cause of action under the Civil Rights Act, said at page 818:

"Since *Snowden* v. *Hughes*, 321 U. S. 1, it has been said over and over again that it was not intended by the 14th Amendment that all matters formerly within the exclusive cognizance of the State should become matters of national concern * * * What we have in the substantive counts before us is essentially a charge of false imprisonment and, perhaps, malicious prosecution to which has been added the unsupported allegation that the plaintiff was thereby deprived of the rights to due process and other rights secured by the 14th Amendment. It may be that the complaint alleges facts sufficient to support an action for false arrest or malicious prosecution. But to show that the defendant deprived the plaintiff of rights and immunities secured by the 14th Amendment * * * or conspired to that end, plaintiff relies upon bare generalities and conclusions unsupported by factual allegations. If this is sufficient then every State Court case of false imprisonment may be brought within Federal jurisdiction by the mere unsupported assertion that as a consequence of such false imprisonment the plaintiff was deprived of due process or of other rights secured by the 14th Amendment. The decisions are to the contrary."

In *Mitchell* v. *Greenough* (9th Cir.), 100 F. 2d 184, an order sustaining a motion to dismiss the complaint was af-

firmed where the complaint charged that the defendants, prosecuting officers, judge and witnesses had conspired to obtain the plaintiff's conviction in a criminal prosecution by knowingly using perjured testimony in violation of the Civil Rights Act. The Court held that there was no conspiracy under the Civil Rights Act because the plaintiff had been subjected to no greater hazard than any other individual in the state. *The Court pointed out that the prohibition against "denial of equal protection of the law" was to prevent legislation or action against a class or classes.*

In *McGuire* v. *Todd* (5th Cir.), 198 F. 2d 60, a complaint for conspiracy was filed against various city officials and a judge of the Corporation Court, charging a deprivation of the plaintiff's Civil Rights, and the court said at page 63:

> "It is sufficient for us in this case to say: that as other courts have done, we disregard as mere conclusions, the loose and general, the factually unsupported characterizations of the complained of acts of the defendants, as malicious, conspiratorial and done for the purpose of depriving the plaintiffs of their constitutional rights; that the things defendants are alleged to have done, as distinguished from the conclusions of the pleaders with respect to them do not constitute a deprivation of the civil rights of the plaintiffs, do not give rise to the cause of action claimed, and that the judgment dismissing the complaint should be affirmed."

To the same effect are *Moffett* v. *Commerce Trust Co.* (8th Cir.), 187 F. 2d 242, *Campo* v. *Niemeyer* (7th Cir.), 182 F. 2d 115, and *Shemaitis* v. *Reid* (7th Cir.), 193 F. 2d 119.

In *U. S.* v. *Cruikshank*, 92 U. S. 542, the U. S. Supreme Court in sustaining a dismissal of criminal charges asserting conspiracy to deny civil rights said (pp. 553-554):

> "It is no more the duty or within the power of the United States to punish for a conspiracy to falsely

imprison or murder within a State, than it would be to punish for false imprisonment or murder itself."

In *Collins* v. *Hardyman*, 341 U. S. 651, the U. S. Supreme Court said with respect to the Civil Rights Act and the right of a federal court's jurisdiction thereunder (p. 656):

"This statutory provision has long been dormant. It was introduced into the federal statutes by the Act of April 20, 1871 entitled 'An Act To Enforce The Provision of the 14th Amendment of the Constitution of the United States and for Other Purposes.' The Act was the last of the reconstruction legislation to be passed on the 'conquered province' theory which prevailed in Congress for a period following the Civil War. This statute, without separability provisions, established the civil liabilities with which we are concerned as well as other civil liabilities."

The Court further said (p. 661):

"Passing the argument fully developed in the *Civil Rights* case, that a group of individuals cannot deprive anybody of constitutional rights though they may invade and violate those rights, it is clear that this statute does not attempt to reach a conspiracy to deprive one of rights unless it is a deprivation of equality of equal protection of the laws. This is in accordance with the purpose of the Act to put the freed negro on an equal footing before the law with his former master. The Act apparently deemed that necessary and no further."

At page 661, the Court further said:

"Plaintiffs rights were certainly invaded, destroyed and lawlessly violated but neither their rights nor their quantity of rights under the law have been or were intended to be denied or impaired. Their rights under the law and due protection of the laws remain untouched and equal to the rights of every other Californian and may be vindicated the same way and with the same effect as those of any other citizen who suffers violence at the hands of a mob."

To the same effect is the case of *Snowden* v. *Hughes*, 321 U. S. 1, where the Court said at pages 7 and 8:

> "Nor can we conclude that the action of the Illinois State Primary Canvassing Board, even though it be regarded as state action within the provisions of the 14th Amendment, was a denial of the equal protection of the laws. The denial alleged is of the right of the petitioner to be elected to public office upon receiving a sufficient number of votes, etc. There is no allegation of any facts tending to show that in refusing to certify petitioner as a nominee, the Board was making any intentional and purposeful discrimination between persons or classes."

The Court further said (p. 8):

> "The unlawful administration by State Officials of a State Statute valid on its face resulting in its unequal application to those who are to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional and purposeful discrimination."

With respect to plaintiff's claim that his constitutional rights were denied him by an illegal search and seizure, the decision in the case of *United States ex rel. Rooney* v. *Ragen* (7th Cir.), 173 Fed. 2nd 668, is pertinent. In that case this court held that an illegal search and seizure by State officials does not constitute a violation of the Due Process Clause of the Federal Constitution.

III.

The Petition for Certiorari Should Be Denied.

There is, in fact, no conflict in the decisions of federal cases on the question of the exemption of state judicial officers from personal liability for damages under the Civil Rights Acts. The immunity is the same immunity that has existed throughout the ages in our common law.

All federal decisions since the decision in the case of *Laughlin* v. *Rosenman*, 163 F. 2d 838, have confirmed the application of the doctrine of immunity to all state judicial officers within their official capacity. See *Cawley* v. *Warren, et al.*, 7th Cir., Opinion #11160, and cases there cited.

The petitioner in the instant case has been twice convicted on the original charge of armed robbery. It is difficult to conceive of a case where guilt has been more firmly established. Public policy demands that the public be protected from acts of violence such as were charged against this defendant and on which he was convicted, and that state law enforcing officers should not be required to defend the multiplicity of groundless suits which would follow as an inevitable consequence of every failure to obtain a conviction or, what is perhaps worse, in every case where the conviction is reversed by a reviewing court.

The great mass of civil rights litigation against law enforcement officers and agencies which recently has been swamping the federal courts points up the necessity of fixing reasonable limits to the right to invoke the jurisdiction of the federal courts under the Civil Rights Acts. As this court has frequently stated, not every assault, not every false arrest, and not every instance of misconduct by a local law enforcement officer calls for the assumption of federal jurisdiction under the Civil Rights

Statutes. Especially is this true in the case at bar where plaintiff is not complaining of police brutality but of the quality of the evidence which two juries have found sufficient for conviction.

CONCLUSION.

For the reasons herein expressed, it is respectfully urged that the petition for certiorari be denied.

Respectfully submitted,

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Attorney for Respondents, Fremont Nester, Edward Piotter, and Larry Vodvarka.

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS,
For the Seventh Circuit.

No. 11234. October Term and Session, 1954.

Talbot Jennings,
Plaintiff-Appellant,
vs.
Fremont Nester, Edward Piotter, Larry Vodvarka, John S. Boyle, James A. Brown and John Phillips,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 29, 1954.

Before FINNEGAN and SWAIM, *Circuit Judges*, and PLATT, *District Judge*.

SWAIM, *Circuit Judge*. In 1948 the plaintiff Talbot Jennings, was arrested, tried and convicted of a felony. He was sent to the Illinois State Penitentiary. Three years later he was granted a new trial under the Illinois Post-Conviction Hearing Act, reconvicted and sent back to prison where he is now incarcerated. See *Jennings* v. *Illinois*, 342 U. S. 104; *People* v. *Jennings, et al.*, 411 Ill. 21.

After his second conviction, the plaintiff sued the state's attorneys and police officers, who had arrested him before his first trial, for damages under the Civil Rights Act, 42 U. S. C. A. Secs. 1983 and 1985 (1953 Pocket Part). The

lower court dismissed the complaint for failure to state a cause of action and this appeal was taken.

Three of the defendants, Boyle, Brown and Phillips, are state's attorneys, and the complaint alleges that they were acting in their official capacities. As such they fall within the rule announced by this court in *Cauley* v. *Warren, et al.*, No. 11160 (October 13, 1954). In the *Cauley* case we held that state's attorneys when acting in their official capacities are protected by the same immunity in civil cases that is applicable to judges. See *Laughlin* v. *Rosenman*, 163 F. 2d 838, and cases cited. The complaint therefore fails to state a cause of action as to the three above named defendants.

As to the remaining three defendants, the complaint charges both conspiracies to commit and the actual commission of four acts depriving plaintiff of his constitutional rights. The acts alleged were unlawful search of plaintiff's person, the seizure of certain of his personal property, the introduction into evidence of the unlawfully seized property, and the deliberate use of perjured testimony in his trial. Title 42 U. S. C. A. Sec. 1983 gives a cause of action for deprivation of due process and Section 1985 gives a cause of action for deprivation of equal protection. *Ortega* v. *Ragen*, 7 Cir., No. 11177 (November 1, 1954); *McShane* v. *Moldovan*, 6 Cir., 172 F. 2d 1016, 1018, n. 2; *Bottone* v. *Lindsley*, 10 Cir., 170 F. 2d 705, 706, certiorari denied 336 U. S. 944. Section 1983 does not mention conspiracy, while Section 1985 does. Therefore, the Act creates a cause of action for a conspiracy to deny equal protection but not for a conspiracy to deny due process. *Mitchell* v. *Greenough*, 9 Cir., 100 F. 2d 184, 186. There must, of course, be an actual denial of due process before a cause arises.

The complaint clearly does not state a cause of action for a denial of equal protection. Although it alleges improper acts on the part of the defendants, there is nothing

to indicate that every citizen of Illinois is not potentially subject to the same treatment. See *Mitchell* v. *Greenough*, *supra*. If the complaint states a cause of action it is for deprivation of due process, therefore, the plaintiff's charges of conspiracy are without effect, since, as already pointed out, conspiracy to deny due process does not give a cause of action under the Civil Rights Act.

Thus reduced, the complaint charges three police officers (Nester, Piotter and Vodvarka) with illegal search and seizure, and one of them (Piotter) with perjury. The complaint also shows that plaintiff was given a new trial by the State of Illinois and convicted of the same crime a second time. We must assume, without an allegation to the contrary, that the three years served by the plaintiff because of his first conviction were taken into account when he was sentenced the second time, and that he has not suffered any additional imprisonment because of his first trial. The facts support this assumption. Plaintiff's first sentence was for ten to twenty-five years; his second sentence was for three to fifteen years. There is no allegation that the second trial was not fair, or that plaintiff's constitutional rights had not been respected. On the contrary, it appears from the plaintiff's own complaint that his rights were fully respected in the second trial.

The Civil Rights Acts were enacted to protect the civil rights of individuals, and not to discipline local law enforcement officers for acts that are later corrected. *Screws* v. *United States*, 325 U. S. 91, 98; *Lyons* v. *Weltmer*, 174 F. 2d 473. The common law provides adequate actions for damages against errant law enforcement officials. See *Wolf* v. *Colorado*, 338 U. S. 25, 30, n. 1. In determining whether or not plaintiff's constitutional rights have been deprived, we must look at everything that transpired. It is obvious from the complaint that as he stands today, the plaintiff has been accorded due process as required by the Fourteenth Amendment.

If we should allow this action for what, if anything, was only a temporary denial, then every new trial under the Illinois Post-Conviction Hearing Act, or any like procedures in other states, would give rise to a cause of action for damages under 42 U. S. C. A. Sec. 1983 or Sec. 1985. We are sure that Congress did not intend such a result.

The purpose of the Civil Rights Acts has been achieved with regard to the plaintiff. He has been given a fair hearing in the state courts with every procedural guarantee required by the Fourteenth Amendment. The improperly obtained evidence was not used against him in the second trial, which is even more than due process requires. *Wolf* v. *Colorado, supra.* Because all this appeared in the complaint, it was properly dismissed in the District Court.

AFFIRMED.

FINNEGAN, *C. J.* I concur in the result reached in this opinion, but not with all that is said.